U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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SEP 18 2007

FILE: [redacted] Office: TEXAS SERVICE CENTER Date:
SRC 06 147 52369

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner is an adult day health center. It seeks to employ the beneficiary permanently in the United States as a social worker pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel notes that the petitioner showed sufficient net income to cover the proffered wage in 2005 and that the director erroneously evaluated the petitioner's taxable income, which included a deduction for previous losses not incurred in 2005. For the reasons discussed below, we concur with counsel.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted for processing on December 10, 2005. The proffered wage as stated on the ETA Form 9089 is $13.05 per hour, which amounts to $27,144 annually. On the ETA Form 9089, Part J, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have an establishment date in 2000, a gross annual income of $1,527,613, a net income of $57,102 and 22 employees. In support of the petition, the petitioner submitted its 2004 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on September 13, 2006, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports,

federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted its 2005 IRS Form 1120. As the 2004 tax return predates the priority date in this matter, we will only consider the petitioner's 2005 tax return. As of the date of appeal, December 27, 2006, the petitioner's 2006 return would not have been available. The 2005 tax return shows a net income of $71,603 "before net operating loss deduction and special deductions." The petitioner's actual taxable income was $0 after deduction of carryover net operating losses.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on November 28, 2006, denied the petition. In her decision, the director relied on the petitioner's taxable income.

As the petitioner has not established that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, Citizenship and Immigration Services (CIS) will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner's ability to pay the proffered wage. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). *See also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, while we will not consider depreciation or other expenses for the tax year in which they were incurred, net operating loss deductions are deductions for losses incurred during previous years. *See* Black's Law Dictionary 205 (7th Ed. 1999) (definition of "carryover.") As the net operating loss listed on the 2005 tax return relates to a previous year, it should not be considered in evaluating the petitioner's ability to pay the proffered wage in 2005. As the petitioner's net income that year was well above the proffered wage, the petitioner has established its ability to pay the proffered wage as of the priority date.

The petitioner submitted evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2005, the most recent year available on the date the petition was filed. Therefore, the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden.

ORDER: The decision of the director is withdrawn. The appeal is sustained and the petition is approved.